

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRD REGION**

**THE RESEARCH FOUNDATION OF THE
STATE UNIVERSITY OF NEW YORK
OFFICE OF SPONSORED PROGRAMS¹**

Employer

and

Case 3-RC-11410

**LOCAL 1104, COMMUNICATION WORKERS
OF AMERICA, AFL-CIO²**

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended (“Act”), a hearing was held before a hearing officer of the National Labor Relations Board (“Board”).

Pursuant to Section 9(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ I find:

The hearing officer’s rulings were free from prejudicial error and are hereby affirmed.

The parties stipulated that The Research Foundation of the State University of New York Office of Sponsored Research Program (“Employer”) is a not-for-profit New York State

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ Post-hearing briefs were filed by the Employer and Petitioner and have been duly considered.

corporation with an office and a principal place of business in Albany, New York; a Syracuse, New York facility (the facility at issue herein); and other facilities located throughout the State of New York, where it is engaged in the administration of sponsored academic research. Annually, the Employer, in conducting its operations, derives gross revenues in excess of one million dollars, and purchases and receives at its various New York facilities, goods and services valued in excess of \$50,000, directly from points outside the State of New York. Based on the parties' stipulation and the record as a whole, I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The parties stipulated, and I find, that Local 1104, Communication Workers of America, AFL-CIO ("Petitioner") is a labor organization within the meaning of Section 2(5) of the Act.

A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Sections 2(6) and (7), and 9(c)(1) of the Act.

The Petitioner seeks to represent all full-time and regular part-time research project assistants ("RPAs") and research support specialists ("RSSs") employed by the Employer at its Syracuse, New York facility, excluding all confidential employees, guards, and supervisors as defined in the Act, and all other employees.

ISSUES

This case presents three issues. The first issue concerns whether RPAs employed at the Employer's Syracuse, New York facility are employees within the meaning of Section 2(3) of the Act. The Petitioner contends that *New York University*, 332 NLRB 1205 (2000) ("NYU"), and *Boston Medical Center Corp.*, 330 NLRB 152 (1999) ("BMC"), establish that the RPAs are employees. The Employer contends that these cases do not support Petitioner's assertion and that the RPAs are

non-employee students who are properly excluded under *The Leland Stanford Junior University*, 214 NLRB 621 (1974) (“*Stanford*”). The second issue concerns whether the RPAs are temporary employees who should be excluded from the petitioned-for bargaining unit. The Employer asserts and the Petitioner denies that RPAs are temporary employees. The third issue concerns whether the community of interest between the RPAs and RSSs warrants their placement in a single bargaining unit.⁴ The Employer asserts that the RPAs and RSSs do not share a community of interest.

PRIOR PROCEEDINGS

In Case 3-RC-11184, the Region held a representation hearing in early 2002, where the identical parties litigated the same issues presented herein. Case 3-RC-11184 concerned whether the Employer’s RPAs at the State University of New York at Albany (“SUNY-Albany”) were employees under the Act. In Case 3-RC-11184, the Regional Director issued a Decision and Direction of Election dated March 13, 2002, presently pending review before the Board, in which the Employer’s RPAs at SUNY-Albany were found to be employees under Section 2(3) of the Act.

In Case 3-RC-11313, the Region held a representation hearing in early 2003, where the identical parties litigated the same issues presented herein. Case 3-RC-11313 concerned whether the Employer’s RPAs at the State University of New York at Buffalo (“SUNY-Buffalo”) were employees under the Act. In Case 3-RC-11313, the Regional Director issued a Decision and Direction of Election dated April 11, 2003, presently pending review before the Board, in which the Employer’s RPAs at SUNY-Buffalo were found to be employees under Section 2(3) of the Act.

⁴ The parties stipulated that RSSs are Section 2(3) employees.

As a result, given that the records developed in Cases 3-RC-11184 and 3-RC-11313 (“the preceding cases”) are highly relevant to the instant litigation, and for the purposes of expediency and efficiency, the parties stipulated that those records, including the transcripts and exhibits, are factually similar to the record that would be developed in the instant case and thus agreed to incorporate the preceding cases’ records into the instant record. Furthermore, the parties stipulated that the evidence adduced in the preceding cases applies in the instant case, except where the parties have presented contrary evidence herein.

FACTS

The Employer is a non-profit educational corporation, which has been chartered by New York State law and the New York Board of Regents. The Employer promotes the educational mission of the State University of New York (“SUNY”). SUNY consists of 64 campuses that are located throughout the State of New York. The Employer’s charter articulates its relationship with SUNY with the following objective:

To finance the conduct of studies and research in any and all fields of the arts and sciences, of benefit to and in keeping with the educational purposes of the State University of New York.⁵

In keeping with this objective, the Employer solicits and collects from various federal and state agencies, corporations and private foundations grant monies that are used to fund educational research.⁶ Such grants usually fund a research project for a one to four-year period.

⁵ The Employer facilitates SUNY’s ability to process research grants. The Employer exists because the State regulations, which would, in the absence of the Employer’s existence, control SUNY’s conduct concerning grants, are too unwieldy for the administration of short-term research grants.

⁶ A sampling of grantors includes the National Science Foundation; National Inst. of Health; National Inst. of Mental Health; U. S. Dept. of Energy; Social Security Admin.; U.S Dept. of Transportation; U.S. Dept. of Justice; U.S. Dept.

These grants are mutually advantageous to both the Employer and SUNY. The Employer benefits because up to 40 percent of all grant monies are deposited in its general coffers. SUNY benefits because its faculty members work on these grants and publish the resulting research.

SUNY, like the Employer, has a Syracuse campus, which is called the College of Environmental Science and Forestry (“SUNY-ESF”).⁷ SUNY-ESF offers a variety of graduate and professional degree programs in environmental science and forestry.⁸ Masters degree candidates must complete the requisite number of credit hours and, in some cases, prepare a graduate research thesis.⁹ Doctoral candidates must complete the requisite number of classroom and non-classroom credit hours, pass a comprehensive examination, obtain research proficiency in their field and prepare a dissertation. A dissertation is a novel scholarly work related to the student’s field of study, which typically takes multiple years to complete.

SUNY-ESF professors utilize the Employer to conduct certain research projects. A SUNY-ESF professor, who is called a principal investigator (“PI”), will initially formulate a novel research idea. The PI then identifies potential grantors who may be willing to fund the research project. The PI then drafts a grant proposal, which describes the scholarly purpose, importance of the anticipated research project, monies required for such activity and anticipated

of Education; U.S. Dept. of Defense; U.S Dept. of Health and Human Serv.; Ford Found.; Robert Wood Johnson Found.; Rockefeller Brother Fund; N.Y. State Education Dept.; Dow Corning Corp.; International Paper Co.; Martin Marietta Energy Systems, Inc.; and Proctor Gamble Pharmaceuticals.

⁷ SUNY-ESF offers degree studies in chemistry; construction management and wood products engineering; environmental and forest biology; environmental resources and forest engineering; environmental studies; forest and natural resource management; landscape architecture; and paper science engineering. SUNY-ESF also houses interdisciplinary research centers, including the Adirondack Ecological Center, Center for Applied Microbiology, Center of Biotechnology in Forestry, Cellulose Research Institute, Empire State Paper Research Institute, Great Lakes Research Consortium, Economy and the Environment, NASA Affiliated Research Center and Roosevelt Wildlife Station.

⁸ The Employer cannot confer masters or doctoral degrees upon students.

⁹ A graduate research thesis is a scholarly paper.

budget. This draft is then proffered to the Employer, who ultimately submits the grant proposal to the potential grantor under the Employer's auspices.

When a grantor accepts a research proposal, the grantor's funds are deposited in one of the Employer's accounts. The PI, in accordance with the grant proposal, then expends the deposited funds.¹⁰

A grant proposal has a budget for anticipated costs, such as equipment, travel, materials and personnel. In addition to the PI, who enjoys ultimate responsibility, a research project generally employs additional personnel. PIs typically recruit masters and doctoral degree candidates to work on these research projects as RPAs, and RSSs and other ancillary staff to perform other support functions.

RPAs are SUNY-ESF students the Employer hires to work on its research projects. The Employer's *Student Titles Policy* states that RPAs must meet the following criteria:

1. The employee is enrolled as a full time SUNY student. An employee is a SUNY student during the period that begins on the first day of the first semester in which he or she is enrolled and ends with the last day of the last semester during which he or she is enrolled.
2. The employee is working part time or, if employed full time in the summer, was enrolled as a full time student during the preceding academic year.
3. The employee is engaged in work related to the student's education and training that leads to the fulfillment of academic requirements.¹¹

¹⁰ All solicited grants strive to explore new frontiers in particular academic field.

¹¹ RSSs are not subject to the Employer's *Student Titles Policy*, which essentially means that RSSs are not required to be enrolled as SUNY students.

PIs recruit RPAs and RSSs in various ways. PIs recruit employees by posting vacancies, advertising, e-mail, word-of-mouth and soliciting students.¹²

A PI has full authority to select RPAs and RSSs from the applicants. Once an applicant is selected, the PI and RPA/RSS jointly complete an *Employee Assignment Form* (“EA form”), which is then submitted to the Employer’s human resources office for processing. The EA form contains personal information about the applicant such as name, social security number, nationality, ethnic origin, visa status, veteran status and education; and occupational information such as title, work hours, department and salary. The EA form also contains a “Declaration and Authorization,” to be signed by the RPA/RSS, which states:

I accept the position ... as an employee of the Research Foundation.... I understand that this position is subject to final approval by the Research Foundation and is terminable at will. I have read the Patent Waiver and Release Agreement and accept it as a condition of employment. I also agree to abide by all of the policies and regulations of the Research Foundation.

RPA/RSS jobs are generally short-term opportunities. Although some RPAs or RSSs may work longer, SUNY-ESF RPAs or RSSs are generally appointed for consecutive academic years, single academic years, semesters or summers. However, irrespective of the term of their initial appointment, some SUNY-ESF RPAs or RSSs have their appointments renewed and remain employed for multiple consecutive years.¹³

RPAs and RSSs are paid on a bi-weekly basis. At SUNY-ESF, RPA compensation ranges from approximately \$10,400 to \$27,500 per academic year.¹⁴ RPAs often work on summer research

¹² The PI is often the RPA’s dissertation adviser.

¹³ The record does not state how often reappointments occur or the average duration of employment.

¹⁴ The academic year runs from the fall through the succeeding spring.

projects for additional compensation. The Employer deducts federal and state income taxes from an RPA's compensation, but does not deduct F.I.C.A. At SUNY-ESF, RSS compensation ranges from approximately \$19,000 to \$30,000 per calendar year. The Employer deducts federal and state income taxes, as well as F.I.C.A., from RSS wages.

With respect to benefits, RSSs enjoy slightly more extensive benefits than RPAs. Specifically, only RSSs receive vacation, holiday, sick leave, retirement, long-term disability and life insurance benefits.¹⁵ However, RPAs and RSSs are both offered tuition scholarships during their employment. Similarly, RPAs and RSSs are both offered health, dental, vision and drug coverage, and a dependent care flexible-spending program.¹⁶

SUNY-ESF RPAs are assigned diverse duties. They collect and analyze data, draft reports and design studies within the framework of the grant and the PI's instructions. They may study a specific subject in the library for many months before actually performing their "hands-on" duties. RPAs may also perform mundane tasks such as cleaning or setting up a lab.

The RPA job description aptly describes these variations:

Activities will vary in terms of involvement and may be carried out in the laboratory, library, or in field studies. Activities may include assisting in the organizing and conduct of a research plan, developing methods of research, tests, and data collection, or making judgments through observation, interviews, and review of documents. Incumbents may also analyze and evaluate data, write reports or collaborate with research workers in other disciplines as required....

¹⁵ The RSSs' paid time off benefit equals 0.9 percent of their total compensation package.

¹⁶ While RSSs are offered a health coverage benefit valued at 11.9 percent of their wages. RPAs receive health benefit coverage valued at 6.5 percent of their wages.

Thus, a SUNY-ESF RPA's job may have a substantial,¹⁷ limited¹⁸ or insignificant¹⁹ impact on the ultimate completion of their dissertation.²⁰ The Employer and grantors permit RPAs to use, for academic purposes only, research data obtained during their employment. In some cases, an RPA may use a portion of their research project's data or analysis to prepare a portion of the dissertation. In other situations, RPAs may apply certain skills that they acquired during their employment to research their dissertation. The record thus establishes that, generally, some of an RPA's work for the Employer will bear some relationship to a portion of their dissertation.

¹⁷ A SUNY-ESF PI, who specializes in environmental and forest biology, testified that there is generally a close relationship between his RPAs' dissertations and their RPA work. He described one RPA's thesis as being correlated to their lab work approximately 80% to 90% of the time, another RPA's thesis as a "100% match" and a different RPA's thesis as only an 80% match. Another SUNY-ESF PI, who teaches biochemistry, stated that an RPAs dissertation and their RPA work are "exactly the same thing." Another SUNY-ESF PI stated that one RPA's duties exactly matched her dissertation, while another RPA had to perform additional non-RPA assignments to complete her dissertation.

¹⁸ A SUNY-ESF PI, who is assigned to the environmental resources and forest engineering department, stated that while RPAs generally use the data developed under a grant for their dissertations, their dissertations generally differ from their RPA work because students add a "different intellectual value" to the data set. The same PI stated that a segment of the research that RPAs perform is discarded and not useful for their dissertation. Two SUNY-Buffalo RPAs, both of whom were pursuing civil engineering degrees, testified that certain RPA duties bore a close relationship to their Ph.D.s, while other duties bore no relationship whatsoever. When a SUNY-Albany RPA who was pursuing a Ph.D. in chemistry was asked, "was everything that you do [as an RPA] dissertation oriented?," he responded, "[n]o, some of it is actually towards presenting various presentations for outside use. For example, for finding further funding for the program...." By way of further example, a SUNY-Albany RPA who was drafting a dissertation on flavonoids, described the relationship between her dissertation and RPA work as only "slightly" related.

¹⁹ A SUNY-ESF RPA stated that he performs many tasks as an RPA that bear little or no relationship to his anticipated dissertation topic. By way of example, on one occasion, the RPA was directed by his PI to serve as a teaching assistant for a course that the PI was teaching. These teaching assistant duties bore no relationship to his dissertation. Another SUNY-ESF RPA stated that certain RPA duties are "really not related to [his] dissertation" Still another SUNY-ESF RPA spent two summers of RPA work collecting data on a research cruise that bore no relationship to his dissertation. A SUNY-Albany RPA, who is pursuing a Ph.D. in geography, testified that there is no relationship whatsoever between her dissertation and RPA duties. When a SUNY-Albany PI, who was a physics professor, was asked at the hearing whether a specific RPA's responsibilities were related to his dissertation, the PI responded, "Not very much. This is what we call community service." The same SUNY-Albany PI discussed a different RPA sweeping out a lab in order to assist with the lab's redesign.

²⁰ In an isolated example at SUNY-Albany, an RPA helped the PI write the grant proposal and then devoted all of her time as an RPA to working on her dissertation. The Employer presented no evidence that other RPAs did the same at SUNY-ESF, SUNY-Buffalo or SUNY-Albany.

RSSs are assigned diverse duties. Similar to RPAs, RSSs collect and analyze data, draft and prepare reports, and design studies within the framework of the grant and the PI's instructions. RSSs perform a great deal of "hands on" work, including data collection at rural field locations; repairing, transferring and maintaining equipment; preparing and maintaining vessels for upcoming tasks; operating farm equipment and vehicles; caring for vegetation or specimens being studied; or various secretarial duties. RSSs often perform such duties alongside, or in tandem with, RPAs.

The RSS job description describes their diverse duties:

Incumbents carry out assignments that entail specialized training and experience in operating equipment, carrying out test procedures, and using special methods for data collation and interpretation....

Requires fundamental knowledge of scientific, medical or other disciplinary terminology and associated mathematical competence usually demonstrated by a bachelor's degree....

Requires the use of specialized techniques in the field of endeavor to make observations, collect data, use survey instruments and techniques, and make related calculations using mathematical formulae....

Incumbents operate and make decisions within defined test of analytical protocols, relying on the experience and direction of research scientists for carrying out more complex analytical tasks....

RSSs, who are generally recruited from the non-student ranks, possess diverse backgrounds. Thus, while some RSSs hold graduate and other advanced degrees, other RSSs may only hold bachelor's degrees. Different RSSs have different educational backgrounds and experience. The level of education and experience needed by the research project determines the education and experience level required for the RSS. Unlike their RPA counterparts, who are generally pursuing doctoral degrees and completing dissertations, RSSs are generally not pursuing doctoral degrees.

PIs supervise SUNY-ESF RPAs and RSSs by assigning them duties connected to their research grant. The PI generally exercises more control over novice RPAs and RSSs and exercises less control as they acquire experience. The RPA job description memorializes this supervisory relationship:

Incumbents perform assigned duties in scholarly or scientific investigation or inquiry or in a program of public service....

Incumbents carry out activities under the general supervision of the Principal Investigator ... in conformance with the requirements of the research grant, contract, or sponsored program....

Incumbents exercise the creativity, judgment, and discretion required for the performance of assigned duties....

Although SUNY-ESF RPAs are formally assigned 20 hours of work per week, the actual practice is flexible and equates to RPAs averaging at least 20 hours of work per week. An RPA's workweek fluctuates according to their project's weekly demands. When an RPA averages more than 20 hours of work per week, they receive no additional compensation.²¹ Although some PIs closely monitor RPA attendance, others simply rely upon the honor system. The PI is ultimately responsible for assuring the Employer and grantor, via a written report, that their RPAs have met their obligations.

RSSs work either a full-time schedule of 40 hours per week or a part-time schedule of 20 hours per week. Full-time RSSs typically work Monday through Friday. There are 14 full-time and 2 part-time RSSs.

PIs can discharge RPAs and RSSs at will. Such discharges do not affect whether SUNY-ESF ultimately awards former RPAs their degrees.

²¹ Some RPAs work 50 or more hours per week for the Employer.

The Employer also governs RPA and RSS conduct with several personnel policies. These workplace policies are entitled: discrimination policy; procedure for resolving allegations of discrimination; sexual harassment policy; nondiscrimination on the basis of age policy; no harassment in the workplace policy; nondiscrimination on the basis of sexual orientation policy; procedure for solving problems in the workplace; equal employment opportunity policy; and drug-free workplace policy.

On occasion, the funding for one of the Employer's research projects lapses before a project's completion. This usually results in the premature discharge of the RPAs and RSSs working on the project. Under such circumstances, the affected RPAs may continue to work on the research project on an unpaid and voluntary basis.²² There is no evidence that RSSs volunteer in this manner.

SUNY-ESF does not require masters and doctoral candidates to work for the Employer. SUNY-ESF students also gain needed research experience by performing research for faculty members on projects that are not administered by the Employer or performing research for other employers. The Employer's non-exclusive control over student research opportunities is evidenced by the fact that it employs only 83 RPAs out of a possible pool of 600 graduate students at SUNY-ESF.

SUNY-ESF's doctoral candidates must maintain their status as full-time students until they complete their dissertations. This means that doctoral candidates must register for independent-study, non-classroom credits while matriculating. Doctoral students can satisfy this

²² This usually occurs when the completion of the RPA's dissertation is closely tied to the unfunded project. The record fails to establish how often this scenario arises.

independent-study requirement by working for the Employer, working for other employers, conducting independent research for faculty members, conducting their own research in a library, or drafting their dissertations after their research has concluded.

ANALYSIS

1. RPAs as Section 2(3) employees:

Section 2(3) of the Act broadly defines the term “employee” to include “any employee.” *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91-92 (1995); *NYU*, 332 NLRB at 1205. As a result, the Board has held that:

Unless a category of workers is among the few groups specifically exempted from the Act’s coverage, the group plainly comes within the statutory definition of “employee.”

Id., citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984). The Board determines whether an individual is an employee in accordance with the common law master-servant test. *Town & Country*, 516 U.S. at 93-95; *NYU*, 332 NLRB at 1205. Under the common law master-servant test, an individual is an employee when services are performed for the master, under its control, for compensation. *Town & Country*, *supra*, 516 U.S. at 90-91; *NYU*, 332 NLRB at 1205.

In *NYU*, the Board held that graduate students employed by the university as research assistants were Section 2(3) employees. *Id.* In reaching this holding, the Board first reviewed Section 2(3) and concluded that graduate students and research assistants were not expressly excluded from the Act. The Board then applied the master-servant doctrine and concluded that graduate students performed services for the university under its control, for compensation and, hence, were employees. *Id.*; see also *BMC*, *supra* (medical interns, residents and fellows were Section 2(3) employees, notwithstanding the fact that their employment was primarily educational).

Based upon *NYU* and *BMC*, I find that the Employer's SUNY-ESF RPAs are Section 2(3) employees. As a threshold matter, I note that RPAs do not fall within any categories of workers specifically exempted from the Act's coverage. *NYU*, 332 NLRB at 1205-6. Furthermore, SUNY-ESF's RPAs satisfy the master-servant doctrine, as they clearly perform services, under the Employer's control, for compensation. RPAs perform a service for the Employer by working directly on research grants that bring it substantial revenues. The Employer, through its PIs, controls and supervises the RPAs.²³ The RPA job description, EA form and personnel policies memorialize this supervisory relationship.²⁴ Similarly, RPAs are compensated for their services by bi-weekly stipends, tuition waivers and an assortment of fringe benefits.²⁵

My determination that the RPAs are Section 2(3) employees is buttressed by the fact that their work is not a degree requirement. In this regard, Board Member Hurtgen in his concurrence in *NYU* stated:

[I]t is undisputed that working as a graduate assistant is *not* a requirement for completing graduate education. Nor is such work a part of the curriculum. Indeed the graduate assistants have completed their course work and are preparing their dissertations while they are performing the work involved herein.... Thus, I regard the latter as employees who should have the right to bargain collectively.

²³ PIs report directly to the Employer and, more importantly, to the grantors that keep the Employer in business.

²⁴ PIs supervise RPAs because the success of their research endeavors depends upon such supervision. If a given PI failed to monitor an RPA's work, a research project could fail or a grant may be revoked, which would likely harm the PI's reputation and reduce their ability to perform future research. Given this clear vested interest, PIs have a strong incentive to closely monitor RPAs.

²⁵ The Employer deducts federal and state taxes from RPA wages. The Internal Revenue Code treats RPA stipends as taxable compensation and states that, "[s]ubsections (a) and (d) [exempting certain compensation from gross income] shall not apply to ... payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship of qualified tuition reduction." I.R.C. § 117(c) (1994).

Id. In the instant case, as in *NYU*, working for the Employer is neither a part of SUNY-ESF's curriculum nor a degree requirement. Moreover, the Employer never employs the vast majority of SUNY-ESF's graduate students as RPAs.²⁶

In an attempt to defeat this analysis, the Employer, in its post-hearing brief, argues that working for the Employer is a de facto, or an informal, degree requirement because such work is essential to an RPA's successful completion of their dissertation. The Employer furthers this argument by noting that in some cases, former RPAs voluntarily continue to work for it even after a research grant expires, in order to complete additional research for their dissertations. The Employer then concludes that this conduct demonstrates that RPAs are actually fulfilling an educational purpose in furtherance of their dissertation, as opposed to performing a service for the Employer.

I find that the Employer's "de facto degree requirement" argument is flawed for two reasons. First, the Employer's argument is factually incorrect because the record fails to show whether a significant number of RPAs, other than a few isolated examples, continuously perform work that mirrors their dissertations. Contrary to the Employer's assertion, the record establishes a given RPA's assignments may have a substantial, limited, insignificant or non-existent connection to their dissertations.²⁷ Second, the Employer's argument is inconsistent with Board precedent, which holds that while someone may initially work for an employer and then subsequently volunteer their services, such volunteerism does not change their employee status. *WBAI Pacifica Foundation*, 328 NLRB

²⁶ As noted above, the Employer employs only about 83 of SUNY-ESF's 600 graduate students.

²⁷ The flaw in the Employer's argument is highlighted by a record that fails to identify, beyond some generalities, the projects and tasks that RPAs perform for the Employer; the RPAs' dissertation topics and how, if at all, the RPAs' work duplicates their dissertations. The record paints a general picture of RPAs who perform work, which varies at

1273, 1276 (1999). Thus, the fact that a few RPAs perform volunteer work for the Employer after their jobs end does not erase their original employee status.²⁸

Although an RPA's assignments generally provide them with data and skills that will ultimately aid their dissertation efforts, the Board has held that a derivative employment benefit in the form of advanced training or research experience does not defeat a graduate student's employee status. *NYU*, 332 NLRB at 1207; *BMC*, 330 NLRB at 161. Thus, the fact that RPAs gain research experience during their employment that promotes their dissertation efforts does not defeat their employee status.

In spite of the Employer's assertions to the contrary, *Stanford*, 214 NLRB 621, is distinguishable and does not establish that the instant RPAs are not employees. In *Stanford*, the Board found that certain research assistants were not employees under the master-servant doctrine because they failed to provide a service to their university, for compensation, under the university's control. 214 NLRB at 622-23. With respect to compensation, the Board found that the money earned by the *Stanford* research assistants was tantamount to financial aid, as opposed to compensation for their research efforts, skill or function. *Id.* With respect to control, the Board noted that the *Stanford* research assistants, as opposed to the university, exercised autonomy over their own research efforts. *Id.* With respect to service, the Board noted that Stanford was essentially a disinterested party (*id.*), and later stated in *Cedars-Sinai Medical Center*, 223 NLRB 251, 255 n. 14 (1976) that:

any given time from being closely tied to, somewhat related to, or completely unrelated to their dissertations. The record also fails to show that, as a policy matter, all RPA work duplicates their dissertations.

²⁸ Also, as stated, the record fails to disclose the frequency of such volunteerism.

In terms of the actual research conducted, Stanford was, essentially, a disinterested party. Stanford did not control the research, did not request the research, and, most significantly, did not receive remuneration from a third party for the particular research.

As a result, *Stanford* is distinguishable because the instant Employer is not a disinterested party and receives a sizable economic benefit from the research grants; its PIs directly supervise the RPAs efforts; the Employer directly solicits grant monies and receives grant monies from grantors; it compensates its RPAs for their weekly work with stipends and other benefits, and it maximizes its financial stake in its research projects by requiring RPAs to sign patent waivers.

Contrary to the Employer's assertion, the Board's holding in *NYU* does not require a finding that RPAs are not employees. In *NYU*, while the Board held that the vast majority of the graduate students were statutory employees, the Board excluded a small contingent of student workers:

For the reasons set forth by the Regional Director, we agree that the Sackler graduate assistants and the few science department research assistants funded by the external grants are properly excluded from the unit. *Leland Stanford Junior Univ.*, 214 NLRB 621 (1974). The evidence fails to establish that the research assistants perform a service for the Employer, and, therefore, they are not employees as defined in Section 2(3) of the Act.

Id. at 4 n. 10. The student workers excluded by the Board in *NYU* were not required to commit a minimum number of hours to the university or perform specific tasks, and their research exactly duplicated their dissertations. *Id.* In contrast, the RPAs at SUNY-ESF commit a minimum of 20 hours per week to work, perform specific tasks under their PI's direction and perform work that often does not duplicate their dissertations.²⁹

²⁹ While an RPA generally works for the Employer for an academic year, his/her dissertation generally takes multiple years to complete. Thus, while there may be some duplication or correlation between work performed as an RPA and

Furthermore, even assuming *arguendo* that the record establishes that SUNY-ESF RPAs in certain academic fields exclusively perform work that duplicates their dissertations, which it does not, I would still *not* exclude those RPAs as students under *NYU* because such RPAs, unlike the excluded *NYU* students, would still satisfy the master-servant doctrine. Specifically, they would still remain obligated to work at least 20 hours per week for compensation under the supervision of one of the Employer's PIs *and* this service benefits the Employer by furthering its relationship with its grantors, allowing it to obtain substantial grant monies and affording it potentially valuable patent rights.

The Employer also argues that SUNY-ESF RPAs are not Section 2(3) employees because they receive academic credit during their employment. The Board has rejected this argument and held that medical residents who received academic credit for their work nevertheless remained Section 2(3) employees. *BMC*, *supra*. As a result, such academic credit does not erase the RPAs' employee status.

2. *RPAs' status as temporary employees:*

The Employer also argues that the RPAs should be excluded from the unit as temporary employees. With respect to temporary employees, the Board has held:

It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit and that an employee's eligibility status is determined by his status as of the payroll eligibility date The critical inquiry on this date is whether the "temporary" employee's tenure of employment remains uncertain [The] "date certain" eligibility test for temporary employees ... does not require a party contesting an employee's eligibility to prove that the employee's tenure was certain to expire on an exact calendar date. It is only necessary to prove that the prospect of termination was sufficiently finite on the eligibility date to dispel reasonable contemplation of continued employment beyond the term for which the employee was hired.

that performed for a thesis, it does not appear from the evidence presented that an RPA's work is identical in scope, duration and content to their dissertation.

St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992) citing *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982). However, the Board has made allowances for student-employees and has held that even though the expected length of their employment with their educational institutions is generally short-term due to their probable graduations, they nevertheless are not considered temporary employees. *BMC*, 330 NLRB at 166; *NYU*, 332 NLRB at 1218, n. 43. As a result, I find that the RPAs are not temporary employees.

3. *RPAs and RSSs – community of interest:*

As previously noted, the parties stipulated that the RSSs are employees within the meaning of Section 2(3). The strong community of interest between the RPAs and RSSs warrants their inclusion in a single bargaining unit. It is well established that the Act does not require that a bargaining unit be the most appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). The Act solely requires that a unit be “appropriate” and thus, affords employees the broadest chance to exercise their collective rights. *Id.*

In assessing whether a unit is appropriate, the Board considers the community of interest shared by the affected employees. When the interests of two groups of employees are dissimilar, a single unit is inappropriate. *Swift & Co.*, 129 NLRB 1391 (1961). The Board weighs the following community of interest factors: (1) degree of functional integration (*Seaboard Marine Ltd.*, 327 NLRB 556 (1999)); (2) common supervision (*Associated Milk Producers*, 251 NLRB 1407 (1970)); (3) nature of employee skills and functions (*Seaboard Marine*, supra); (4) interchangeability and contact amongst employees (*Associated Milk*, supra); (5) work situs (*R-N Market*, 190 NLRB 292 (1971)); (6) general working conditions (*Allied Gear & Machine Co.*, 250 NLRB 679 (1980)); and (7) fringe benefits (*Allied Gear*, supra).

The RPAs and RSSs share a strong community of interest. They work together on their projects in a highly integrated manner by performing complimentary, overlapping and some identical tasks. They are commonly supervised by the Employer's PIs. They generally possess similar skills and perform interchangeable tasks. They work together at common work locations at the Employer's Syracuse facility and in the field. Although there are some minor exceptions, in that RPAs do not receive retirement benefits, life insurance, paid leave or long-term disability coverage, RPAs and RSSs are generally subject to analogous working conditions, afforded comparable benefits, and are paid similar wages. The length of their jobs are equally tied to their grant's expiration date.

Although the Employer cites *University of West Los Angeles*, 321 NLRB 61 (1996) for the proposition that students (i.e., RPAs) and non-student employees (i.e., RSSs) of an institution do not share a community of interest when the students' employment is directly related to their continued enrollment at the institution, *University of West Los Angeles* is premised upon precedent (*St. Clare's Hospital & Health Ctr.*, 229 NLRB 1000 (1977)), which the Board has expressly overruled. *BMC*, supra ("the Board has decided to overrule ... *St. Clare's Hospital* and other decisions following those cases...."). Thus, *University of West Los Angeles* is inapplicable.

4. *Conclusion:*

Based on the foregoing, I find that RPAs are employees within the meaning of Section 2(3) of the Act. In accordance with the parties' stipulation, and based upon the record as a whole, I further find that the RSSs are employees within the meaning of Section 2(3) of the Act. Finally, I find that the RPAs and RSSs share a community of interest and should be included in a single appropriate bargaining unit.

APPROPRIATE UNIT

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time research project assistants and research support specialists employed by the Employer at its Syracuse, New York facility; excluding all confidential employees, and guards, and all supervisors as defined in the Act.

There are approximately 99 employees in the bargaining unit found appropriate herein.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate, as described above, at the time and place set forth in the notices of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 1104, Communication Workers of America, AFL-CIO.**

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to lists of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within 7 days of the date of this Decision, 2 copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Acting Regional Director of Region Three of the National Labor Relations Board who shall make the lists available to all parties to the election. In order to be timely filed, such lists must be received in the Albany Resident Office, Room 342, Leo W. O'Brien Federal Building, Clinton Avenue and North Pearl Street, Albany, New York 12207 on or before **March 22, 2004**. No extension of time to file the lists shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 Fourteenth Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by **March 29, 2004**.

DATED at Buffalo, New York this 15th day of March, 2004.

RHONDA P. ALIOUAT, Acting
Regional Director
National Labor Relations Board – Region 3
Thaddeus J. Dulski Federal Building
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